

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

TARGET CORPORATION

Employer

and

Case 29-RC-157687

**UNITED FOOD & COMMERCIAL WORKERS
LOCAL 342**

Petitioner

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all full-time and regular part-time pharmacy employees in the pharmacy section of the store of Target Corporation (herein Target or the Employer) at its 139 Flatbush Avenue, Brooklyn, NY facility. Target maintains that no election should be conducted in the unit sought by Petitioner because Target's pharmacy operations are being sold to CVS. Petitioner contends that the sale of the Target 's pharmacies to CVS is contingent on government approval and that employees should not be denied their right to select a bargaining representative when there is no definite date for the sale to be closed. Petitioner and the Employer stipulated to the appropriate unit of pharmacy employees at 139 Flatbush Avenue and agree that the sole Pharmacist in the unit is a professional employee who, if an election is directed, will need to be given a self-determination vote on whether he wishes to be included in a non-professional unit.

Shao Chen, a Hearing Officer of the Board, held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant Board law, I find that the sale of the Target pharmacy operation to CVS remains indefinite because it is subject to approval of the Federal Trade Commission (FTC) and any sale will only take place following regulatory approval, which is not guaranteed. In addition, CVS has committed to hire the employees employed in the Target pharmacies and thus the unit in question may not cease to exist, unlike cases where an employer has made a definite and certain decision to close its operations. In these particular circumstances, I find that the employees' statutory right to choose or reject union representation should not be denied and I will direct that an election be held.

THE EMPLOYER'S OPERATION

The record evidence shows that the Employer operates a store, including a pharmacy section, at 139 Flatbush Avenue, Brooklyn, NY. The parties stipulated that the pharmacy at the store in question has one Executive Pharmacist, nine pharmacy

technicians and one pharmacy student. The parties also stipulated that the one Executive Team Lead Pharmacist at this store is a Section 2(11) supervisor that possesses supervisory authority within the meaning of Section 2(11) of the Act.

At the hearing, Aaron Alt, the Employer's CEO of Target Canada and Senior Vice President of Finance, testified that he was responsible for negotiating a strategic partnership with CVS in connection with the Employer's health care business. The agreement was negotiated over a six-month period of time. Mr. Alt testified that he has had experience in handling many transactions requiring regulatory approval. On June 12, 2015, the Employer signed an agreement ("Purchase Agreement") to sell the assets of its pharmacy and clinic operations to CVS. Portions of the agreement of sale were entered into the record. This sale would include the pharmacy operations at 139 Flatbush Avenue, Brooklyn, NY, the facility in question.

Mr. Alt testified that the sale transaction is essentially a strategic partnership between CVS and the Employer with three parts. The first part of the transaction is the sale of the pharmacy and clinic operations of the Employer's stores in the United States to CVS. The second part of the operation is that when the Employer opens a new store, which is planned to have a pharmacy or medical clinic, this portion of the new operation will be run by CVS. The third part of the partnership is to co-develop small format stores in ten metro markets across the country where there will be a smaller format Target store with a CVS pharmacy or clinic inside.

At the time of the closing of the sale, the employees of the pharmacy will no longer be employees of the Employer and will receive offers of employment from CVS. The agreement provides that the terms of employment with CVS will be comparable to what the Employer is paying these same pharmacy employees. After the sale is effectuated, if an employee does not accept a job offer from CVS, the employee's employment with the Employer would end because the Employer would no longer be operating the pharmacy.

The Purchase Agreement states that it is conditioned on a review of this sale transaction by the FTC. Specifically, Article VII Conditions to Closing, Section 701 specifically provides that the sale is subject to the condition of Governmental approvals and the issuance of no injunctions or restraints on "the consummation of the acquisition" by CVS of the Employer's pharmacies and clinics. Article V Covenants, Section 501 provides that the Employer will continue to "conduct the Business in the ordinary course of business." Section 5.01 (a) also provides that the Employer will not, without CVS's consent:

(a) adopt or amend in any material respect any Seller Benefit Plan in a manner affecting any Business Employee or grant any Business Employee or to the Business Employees in the aggregate any material increase in compensation or benefits, except (i) as required by Applicable Law, (ii) in the ordinary course of business

or a required under existing agreements or Seller Benefit Plans, (iii) as would relate to a substantial number of similarly situated employees of the Seller, the Seller Affiliates or their respective Affiliates other than Business Employees. . .

Article VIII Terminations; Effect of Terminations provides that if the closing of the sale transaction has not occurred on or prior to March 15, 2016, either the Employer or CVS have the right to terminate the sale agreement or to extend the outside closing date to September 15, 2016.

Mr. Alt testified that the FTC's review process involves a detailed factual review of hundreds of thousands of documents from both the Employer and CVS, which are submitted by the parties to FTC. Mr. Alt testified that the parties made their initial submission of materials within one week after they signed the sales agreement. Both CVS and the Employer are talking with the FTC to answer any questions that they may have about the transaction. Mr. Alt testified that he expects to certify substantial compliance with the FTC's request for information by October 15, 2015. Mr. Alt testified that FTC generally has an initial 30-day review process and that is followed by a second phase in which the FTC requests additional materials. After receiving those materials, the FTC generally has another 60-day period in which to review the additional materials that have been provided. The Employer and CVS currently have an October 15, 2015 deadline for submitting additional documents to the FTC. Mr. Alt testified that the Employer was expecting to compile everything and provide it to the FTC by the October 15, 2015 deadline. The Employer did not submit any letter from the FTC setting forth at what stage the FTC review process had been completed. Mr. Alt testified that he was targeting the closing of the deal between December 31, 2015 and January 15, 2016, but that there is no exact date for the closing. Once FTC approval is obtained, the parties are obligated to close the sale transaction with three days under the terms of the Sales Agreement.

Mr. Alt testified that he was not aware of any conditions that might cause the FTC to deny the sale transaction. However, he admitted that FTC approval is not guaranteed. Mr. Alt further testified that if the FTC has concerns about the transaction, then they would notify the parties and seek to have a conversation about potential remedies to address those concerns. Depending on the remedy sought by the FTC, this could involve additional time, but the parties would have the opportunity to address the FTC's concerns. Mr. Alt also testified that in his experience, it would be unusual for the FTC to reject the transaction, but that the FTC could say no to the transaction and the FTC had the power to file an injunction against the transaction. However, Mr. Alt testified that he had no reason to believe that any of these contingencies would occur. Mr. Alt also testified that State Attorney Generals are entitled to take a look at this sale transaction. He testified that he was aware that a couple of State Attorney Generals had asked about the transaction, but there had been no "activity beyond that."

A document, Target/CVS Health Partnership Store FAQs –July 2, 2015 was received into evidence. The document was prepared by the Employer and distributed to store managers as a guide to answer questions of employees. Mr. Alt said that the FAQ document would not itself be distributed to employees. Page 2 of the document states the following:

When is the transaction expected to close? Are there major milestones leading up to the close? The transaction is subject to customary closing conditions and regulatory approvals, including approval under the Hart-Scott-Rodino Antitrust Improvements Act. We are working closely with regulators to ensure a smooth review process, but it would be speculative to anticipate a specific closing date.

The document is dated July 2, 2015, but at the top, it states that “Newly added FAQs are highlighted in red.” The record is unclear about exactly when this document was sent to store managers, but it would have been on or after July 2, 2015.

Mr. Alt testified that the statement noted above in the FAQ document was true at the time it was issued and that there was not a specific closing date. Mr. Alt also testified that a closing date would not be broadcast to the entire organization. Mr. Alt testified that he was not aware of any subsequent communications to employees about a specific closing date.

BOARD LAW

The Board will not direct an election, and will consequently dismiss a petition, when there is definite evidence of a contracting unit or imminent cessation of operations. See e.g., *MJM Studios*, 336 NLRB 1255 (2001); *Hughes Aircraft Co.*, 308 NLRB 82 (1992). However, petitions have been dismissed only in cases when a permanent layoff is both imminent and certain. *Hughes Aircraft*, *supra* at 83. It is important that both factors be present. *Id.*, citing *Larson Plywood Co.*, 223 NLRB 1161 (1976). Factors considered in determining whether there is sufficient evidence of contraction or cessation to warrant dismissal of the petition are: the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to effectuate the change, and whether the employees have been notified. See *Hughes Aircraft Co.*, *supra*, 308 NLRB at 82-83; *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *Larson Plywood Co.*, 223 NLRB 1161 (1976). Where the change is too speculative to warrant withholding from the employees their statutory right to choose or reject union representation, the Board will direct an election. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). *Gibson Electric*, 226 NLRB 1063 (1976).

APPLICATION OF BOARD LAW TO THE FACTS OF THIS CASE

In the instant case, the Purchase Agreement has, in fact, been signed by the Employer and CVS. However, that sale transaction is subject to regulatory approval and the parties are in the process of providing documents to the FTC to obtain that approval. After the documents are provided to the FTC, the FTC will have a chance to review and consider whether the transaction should be approved considering antitrust principles and the protection of the consumers. While the Employer's representative does not anticipate any problems, FTC approval is not guaranteed and if concerns are raised, this could result in a further passage of time before any sale of the business were to occur. As the Employers' witness conceded, there is no definite date for the closing. In addition, the sale document recognizes that approval could take time and gives both parties the right as of March 15, 2016 to terminate the agreement or to extend the outside date to September 16, 2016. In such circumstances, where the date when the Employer will cease to employ employees in its pharmacy department remains indefinite, I find that this case is guided by the principle of *Hazard Express*, supra, and *Canterbury of Puerto Rico*, supra, and that I should not cut off employees' right to choose or reject representation.

In this regard, I also note that employees have not been told any definite date for the closing and the FAQ document itself, which was produced by the Employer and distributed to managers to answer and discuss these issues with employees, states that the closing is subject to "regulatory approvals" and that "it would be speculative to anticipate a specific closing date." The communications made to employees about the employer's proposed change is one of the factors that the Board considers in deciding whether to process a representation petition. *Hughes Aircraft*, supra.

Further, it is worth noting that the pharmacy operations are not being closed or discontinued. Rather, the evidence shows that if the sale transaction was approved, the pharmacy operation will continue to be operated by CVS inside the Employer's facility. All of the Employer's employees are to be offered employment with CVS at substantially the same terms and conditions of employment. While it is true that the employee may reject these offers, it is equally likely that they will continue to be employed at the pharmacy only under a different employing entity. Therefore, in such circumstances, this case is clearly distinguishable from Board cases where an employer is shutting down or ceasing its operations and employees are being permanently laid off.

Therefore, while I agree with the Employer that some definite steps have been taken to consummate a sale of the pharmacy operations to CVS, the actual date that such sale will be effectuated is uncertain and remains subject to review and approval or disapproval by the FTC. Based on the forgoing, I find that it would effectuate the purposes of the Act to direct that an election be held to determine whether employees wished to be represented for purposes of collective bargaining by the Petitioner.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that the Employer, a domestic corporation, with a retail store located at 139 Flatbush Ave., Brooklyn, New York 11217 (the Atlantic Terminal facility), the only location involved herein, is engaged in the operation of retail stores. During the past twelve months, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross revenues valued in excess of \$500,000, from the operations of its stores and, during the same time period, received at its Atlantic Terminal facility, goods valued in excess of \$5,000, directly from enterprises located outside the State of New York. Based on these facts, I find that the Employer is an employer engaged in commerce within the meaning of the Act. It will therefore effectuate the purposes of the Act to assert jurisdiction in this case.
3. The parties stipulated that United Food & Commercial Workers Local 342 is a labor organization as defined in Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Employer.
4. A question concerning the representation of certain employees of the Employer exists within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act:
5. As discussed supra, based on the fact that the Executive pharmacist is a professional employee, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining, except that Unit A will not be appropriate unit on its own because it is currently a stable one-person unit:

Unit A

All full-time and regular part-time Executive pharmacists, employed by the Employer at its store located at 139 Flatbush Ave., Brooklyn, New York, but excluding pharmacy technicians and pharmacy students, all other employees in the retail section of the store, managers, casual employees, Executive Team Lead pharmacists, clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

Unit B

All full-time and regular part-time pharmacy technicians and pharmacy students employed by the Employer at its store located at 139 Flatbush Ave., Brooklyn, New York, but excluding Executive pharmacists, all other

employees in the retail section of the store, managers, casual employees, Executive Team Lead pharmacists, clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. Employees in Unit A will vote on whether they wish to be included with nonprofessional employees in a unit for purpose of collective bargaining. If the professional employee in Unit A vote "Yes" to the first question indicating a desire to be included in a unit with non-professional employees, the professional employee will be so included, and that vote on the second question will be counted together with the votes of the non-professional employees in Unit B to decide the question concerning representation for the overall unit consisting of employees in Units A and B. If, on the other hand, the professional employee votes "NO", the ballot will be counted as a desire not to be represented. Employees in Unit B will vote whether or not they wish to be represented for purposes of collective bargaining by UNITED FOOD & COMMERCIAL WORKERS LOCAL 342.

A. Election Details

The election will be held on **Tuesday, September 8, 2015** from **1:00 pm to 5:00 pm** in the **Training Room** at the Employer's facility at 139 Flatbush Avenue, Brooklyn, NY.

B. Voting Eligibility

Eligible to vote are those in the units who were employed during the payroll period ending August 22, 2015, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision two list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in Unit A and Unit B.

To be timely filed and served, the lists must be *received* by the Regional Director and the parties by August 28, 2015. The lists must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of each list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the lists shall be filed electronically with the Region and served electronically on the other parties named in this decision. The lists may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the lists within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the

Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: August 26, 2015

/s/ James G. Paulsen

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